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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ALDO JOSE RUIZ, Defendant and Appellant.	B200272 (Los Angeles County Super. Ct. No. NA070957)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles D. Sheldon, Judge. Affirmed.

Mark D. Greenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant Aldo Ruiz appeals from a conviction of 15 counts of sex offenses against his daughter. He contends that the trial court erred in finding a discovery violation, and in excluding the testimony of a defense witness as a sanction. Appellant also contends that the court erred in instructing the jury with CALJIC No. 10.60. We reject appellant's contentions and affirm the judgment.

BACKGROUND

1. *Relevant Procedural Background*

Appellant was charged with 14 counts of committing a lewd act upon a child under the age of 14 years, in violation of Penal Code section 288, subdivision (a).[1] In count 15, appellant was charged with continuous sexual abuse of a child under the age of 14 years, in violation of section 288.5. The information further alleged as to all counts that appellant had previously been convicted of two felonies within the meaning of section 1203, subdivision (e)(4), which requires the denial of probation except under unusual circumstances. In addition, the information alleged pursuant to section 667, subdivision (a)(1), that appellant suffered a prior serious felony conviction, which was also alleged as a "strike" pursuant to sections 1170.12, subdivisions (a) through (d), and 667, subdivisions (b) through (i).

Trial on the prior convictions was bifurcated, and appellant was tried by jury on the current offenses. On May 22, 2007, the jury found appellant guilty of all 15 counts. The trial court found the prior-conviction allegations to be true, based upon documentary evidence and appellant's admissions during the course of cross-examination in the jury phase. On June 27, 2007, appellant was sentenced to 80 years in prison. He filed a timely notice of appeal the same day.

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[1] All further statutory references are to the Penal Code.

2. *Mother's Testimony*

M.S. testified that she married appellant in 1993. Their daughter Y.R. was born in 1994, and was 12 years old at the time of trial. Y.R.'s brother, A.R., was 14 years old at the time of trial, and her sister, J.R., was 8 years old. She and appellant had both been methamphetamine users, and appellant also used heroin. Once, mother walked into her bedroom and saw appellant naked on the edge of the bed, with Y.R. kneeling on the floor in front of him. M.S. asked Y.R. if appellant had done something to her, but Y.R. said he had not. One night, in front of M.S.'s parents and other family members, appellant said, "I think I'm molesting one of my children."

In 2005, the children were taken from their parents due to a report of domestic violence and placed in the temporary custody of appellant's mother. M.S. and appellant separated, and M.S. went to live with her mother. However, M.S. and appellant continued to have a sexual relationship.

Approximately one year later, M.S. was reunited with the children, who came to live with her and her mother. In mid-July, 2006, the children spent a few days visiting their paternal grandmother. They returned home to M.S. on Saturday, July 15, 2006, after a day of swimming in their grandmother's pool. As she was putting the children to bed, M.S. told them the story, as she had before, about her near-molestation when she was four years old, by a babysitter who was interrupted when her parents returned home. M.S. told her children that no one had a right to touch them, and that they should not believe threats. This talk prompted A.R. to suggest that M.S. ask Y.R. about her experience. Y.R. confirmed that her father had touched her, and M.S. called 911. She then telephoned appellant, who drove over and was arrested upon his arrival.

The same evening, after the police arrived, M.S. retrieved from the dirty laundry bag the clothing that Y.R. had worn at her grandmother's home and gave it to the officers. A few hours later, the police instructed M.S. to take Y.R. to the hospital for a sexual assault examination by a forensic nurse.

3. *Y.R.'s Testimony*

Y.R. testified that her father began touching her sexually when she was five years old. The first time was in May 1999, when appellant told Y.R. to take a shower with him, during which he taught her to orally copulate him and to "play with his balls." From that day until Y.R. finished the first grade, appellant ordered her to orally copulate him approximately once a week, and she complied each time.

Y.R. also testified regarding 14 incidents of oral copulation or vaginal penetration, or both, that occurred from the time she was in the second grade in 2002 until shortly before appellant's arrest on July 15, 2006. On most occasions, after Y.R. had orally copulated appellant, he then penetrated her with his penis and ejaculated onto a bandanna. On one occasion, he ordered her to lick his anus. Once, Y.R. continued to comply with his order to orally copulated him even after it caused her to throw up. Sometimes, appellant would have her continue, even though he caused her pain.

One of the incidents occurred in May 2005, while Y.R.'s brother A.R. was asleep in the rear (third-row) seat of the family van, appellant parked, ordered Y.R. to orally copulate him, and then he penetrated her vagina with his penis. When Y.R. told appellant he was hurting her, A.R. woke up. Appellant told A.R. to go back to sleep, and then continued until ejaculation.

Appellant told Y.R. not to tell anyone because he "would get in really big trouble." Y.R. did not tell her mother until shortly before appellant's arrest because she had seen appellant beat M.S., and was afraid that appellant would beat her or even kill her if she told her secret. Two weeks before appellant's arrest, appellant had hit M.S. and threatened to take the children away from her.

The last occasion occurred on the weekend of appellant's arrest, while Y.R. was spending two days at her paternal grandmother's house. Y.R. testified that the night of July 14, 2006, appellant woke her, ordered her to orally copulate him, and then penetrated her vagina with his penis. He ejaculated onto the sleeping bag and told her to go back to sleep.

The next day, Saturday, Y.R. swam in her grandmother's pool with another girl and a boy. She did not remember the girl's name, but her mother was Lisa. M.S. picked her up at 3:00 or 4:00 that afternoon, and took her home. The underwear she wore during the incident the night before was the same underwear that her mother gave to the police. Y.R. identified a photograph of those panties as her own. A few hours after the arrival of the police, she was taken to a "forensic . . . place" where a lady took pictures of her vagina and took DNA samples.

4. *K.B.'s Testimony*

Y.R.'s friend K.B. testified that Y.R. was her best friend in elementary and middle school. In the fifth grade, Y.R. confided in K.B. that her father "would take her and . . . do stuff to her." Y.R. told her that appellant would "take her to the shower and make her lick his thing . . . ." Y.R. also told her that appellant "would stick his thing in her thing," meaning that he placed his "birdie" in her vagina.

Y.R. asked K.B. not to tell anyone her secret, but several months later, Y.R. consented to K.B.'s telling her mother, because she "want[ed] something to happen." The same day, K.B. told Y.R.'s secret to her mother, P.B.[2]

5. *A.R.'s Testimony*

Y.R.'s brother, A.R., testified that he was about one year older than Y.R. He recounted the incident in the van after he had attended a party with his parents and Y.R. He fell asleep in the rear back seat of the van while his father drove. When he awoke, the windows were foggy, and the van was rocking back and forth. He heard his sister say, "Stop, dad. It hurts," and his father reply, "It's not going in anymore." A.R. sat up and saw his shirtless father on top of Y.R. in the middle seat.

A.R. testified that Y.R. would often go into appellant's room, ostensibly to vacuum, with the door closed. Although she would remain there for 30 minutes with the

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[2] P.B. testified that K.B. told her that Y.R. had confided in her that her father was molesting her, and that Y.R. was frightened and did not want anyone to know. P.B. did not report the information.

vacuum cleaner running, A.R. did not think it was actually in use, because the vacuuming sounds did not move. Appellant often took showers with Y.R.

Once, A.R. was in the front seat of the van while Y.R. was sleeping in the very back row of seats, and appellant was driving. Appellant stopped the van and pulled A.R.'s seat all the way forward, making it impossible for him to look back. Appellant got into the back seat, and A.R. heard the sound of a zipper unzipping, and the van rocked back and forth. After awhile, when appellant came back to the driver's seat, appellant asked Y.R. if her clothes were back on.

A.R. was afraid of his father and angry with him. During the six months before appellant's arrest, he became aware of his father's drug use and believed that his father was responsible for his mother's drug use. He had witnessed appellant's violence toward M.S., and was afraid for his mother's safety. Once, appellant punched A.R. in the abdomen because he had told his mother about an affair appellant was having. A.R. claimed that appellant often hit him and beat his mother.

6. *Forensic Science Testimony*

Forensic nurse Malinda Wheeler testified regarding the report prepared by a nurse in her employ, Pamela Walker, an expert in sexual assault examinations. Walker prepared SART (Sexual Assault Response Team) reports after examining Y.R. and appellant.[3] She took swabs from the penis, scrotum, and mouth, and collected a blood or urine sample. In the course of Y.R.'s examination, the nurse took photographs and swabs of the internal and external genitalia.[4] A visual examination of Y.R.'s external genitalia revealed a linear tear in an area known as the posterior fourchette. Wheeler testified that such a tear was a classic injury in female victims of sexual assault, caused by blunt force

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[3] SART reports are uniform in California, prepared on a form designed by the State.

[4] The "SART kits," which included the evidence and samples taken during the examinations, were turned over to law enforcement. Detective Mark Steenhausen testified that he recovered the two SART kits on July 19, 2006, as well as a pair of pink panties and a vial of blood, and booked them into evidence.

trauma that splits the skin. Such an injury heals quickly and becomes undetectable in approximately three or four days. Thus, Wheeler stated, Y.R.'s injury was consistent with penile penetration within four days of the examination.

Bryan Edmonds, senior criminalist with the Los Angeles Sheriff's Department Crime Laboratory, examined the SART kits and a pair of underwear and tested the evidence for bodily fluids, on which he performed DNA tests. Semen was detected on the vaginal, external genital, and external anal samples from Y.R.'s SART kit and on the underwear recovered from the laundry. Edmonds then analyzed the DNA extracted from the vaginal swab, the sperm, the vaginal fluid found in the sperm, and the blood samples taken from Y.R. and appellant. He prepared a DNA report in which he concluded that there was an extremely high likelihood (trillions to one) that the male DNA extracted from the samples was that of appellant, and that the female DNA was that of Y.R. The DNA recovered from the underwear was also consistent with that of appellant and Y.R. Edmonds found no "foreign" DNA markers on the underwear, indicating that the only female DNA on them was Y.R.'s.

7. *The Exclusion of Defense Testimony*

After the prosecution rested, defense counsel proposed to call L.M. to testify for the defense. Counsel informed the court that she intended to testify that she had been present while Y.R. and other children were swimming at their grandmother's home July 14, 2006, that appellant was there, that Y.R. spent the day laughing and playing in the pool, and that Y.R.'s demeanor toward her father was fine. The prosecutor objected, representing that although L.M.'s statement had been taken five months earlier, in December 2006, the defense had failed to supply the report to the prosecution until just that moment.[5]

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[5] Section 1054.3, subdivision (a), requires timely disclosure of persons the defense intends to call as witnesses, as well as any reports of such persons' statements. Sanctions for willful violations may include exclusion of the testimony. (§ 1054.5, subd. (b).) No violation occurs when the necessity to call a witness becomes apparent only after another witness has testified. (See *People v. Hammond* (1994) 22 Cal.App.4th 1611, 1624.)

Defense counsel argued that the testimony should be admitted to rebut Y.R.'s testimony that she never knew her dad, and was afraid of him, and that he was never around or acted like a dad. The court excluded the testimony, finding that it was not rebuttal, as it did not directly contradict any prosecution testimony.

8. *Defense Witnesses*

Appellant's mother, M.R., testified that the whole family had been living with her, but the parents moved out, and the grandchildren stayed with her for a time because the parents had been using drugs. After the children went to live with their mother in Inglewood, appellant moved back in with his mother. However, appellant and M.S. still saw each other, usually on Friday nights.

The weekend that appellant was arrested, Y.R. and J.R., but not A.R., were with her. The children swam that Friday and Saturday. On Saturday, they swam with L.M.'s daughter and two sons. Y.R. and the other children played, jumped, and had fun in her pool for approximately six hours.

Y.R. did not have a change of underwear at her grandmother's house and took her clothes home with her after the visit. She wore lilac or pink cotton panties, which M.R. recognized as belonging to Y.R. Shown a photograph of the panties in evidence and tested by Edmonds, M.R. testified that Y.R. had never had a pair like that, and that she did not see that particular pair that weekend. When appellant took them home to M.S.'s Saturday, Y.R. was still wearing the same clothes, including the panties M.R. recognized.

Appellant testified in his defense. He admitted using methamphetamine and heroin, and taking his anger out on his wife; he broke her nose, gave her black eyes, and once put a gun to her head. The children were usually present when he abused his wife. Appellant admitted having threatened to take the children away from M.S. and to kill her if she left him. After he and M.S. separated, they still had sex, usually in the car on Fridays or Saturdays, including, appellant claimed, the Friday of the weekend he was arrested.

Appellant admitted that he had slept in the same room with Y.R. and J.R. that weekend but denied that any sex act occurred between him and Y.R. On Saturday, he was away in Anaheim until 4:30 or 5:00 p.m. When he arrived home, the children were still in the pool, so he told them to get out and took them home. After dropping them off, M.S. called, saying such things as, "What did you do?" and "You did something to the kids. . . . I'm calling the cops." He returned to M.S.'s home and was arrested soon after he arrived.

Appellant denied ever having touched Y.R. in any inappropriate fashion, or ever having any type of sexual contact with her. He denied hitting A.R. He denied having moved A.R.'s seat forward at any time and did not remember attending a first communion party. He denied ever having cleaned the pool while Y.R. was with him -- it was his brother's job to clean the pool. He denied having been alone with Y.R. at the Orange Avenue house while moving out. Shown a photograph of the panties recovered and tested by Edmonds, he claimed that they belonged to M.S.

DISCUSSION

1. Discovery Sanction

Appellant contends that his last-minute disclosure of L.M. as a defense witness was not a discovery violation. Appellant contends, in the alternative, that the sanction of excluding L.M.'s testimony was an abuse of discretion.

Discovery in criminal cases is reciprocal in California. (§ 1054 et seq.) A defendant must disclose to the prosecution the "names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, . . . which the defendant intends to offer in evidence at the trial." (§ 1054.3, subd. (a).) The witnesses a party "'intends to call at trial'" include "'all witnesses it reasonably anticipates it is likely to call. . . .' [Citation.]" (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 376, fn. 11.) "However, during the trial process, things change and the best laid strategies and expectations may quickly become

inappropriate. . . . After hearing a witness, the necessity of a rebuttal witness may become more important." (*People v. Hammond, supra*, 22 Cal.App.4th at p. 1624.) Under such circumstances, the last-minute designation of a rebuttal witness is not a discovery violation, unless the court finds that it was a willful act designed to circumvent discovery rules. (*Ibid*.)

Rulings on discovery matters are reviewed for abuse of discretion. (*People v. Ayala* (2000) 23 Cal.4th 225, 299.) A trial court will be found to have abused its discretion when its "'decision was palpably arbitrary, capricious, or patently absurd, and resulted in injury sufficiently grave as to amount to a miscarriage of justice.' [Citation.]" (*People v. Lamb* (2006) 136 Cal.App.4th 575, 581.)

Appellant contends that the need for L.M.'s testimony did not become important until Y.R. testified that she was afraid of her father, that she never knew him, that he was never around, and that appellant did not act like a dad. He argues that this testimony was designed to corroborate Y.R.'s credibility by showing that she was genuinely distressed due to her father's behavior. In addition, appellant suggests that he could not have reasonably anticipated that the court would allow this testimony. Thus, appellant contends, L.M.'s testimony was important to refute the impression that her distress was genuine, by showing that the day after an alleged sexual assault by appellant, Y.R. "was playing and splashing merrily with him in the swimming pool."

First, we reject appellant's suggestion that he could not reasonably have anticipated testimony from Y.R. about her fear of her father or her unhappiness due to his behavior. Y.R. was 12 years old at the time of her testimony and was required to recount in detail the horrific abuse appellant inflicted on her since she was a kindergartener. Some expression of her fear and unhappiness could be reasonably anticipated. Indeed, Y.R. broke down during her trial testimony.

Further, appellant is mistaken about what facts were presented to the trial court. We review the trial court's discretion under the circumstances existing at the time of the ruling. (*People v. Lewis* (2008) 43 Cal.4th 415, 455.) In his offer of proof, defense

counsel stated that L.M. would testify that she watched Y.R. happily swim July 14, 2006. As the prosecution pointed out to the court, July 14 was a Friday, and any swimming on that date necessarily took place prior to the assault, which occurred in the evening, after Y.R. had fallen asleep. Thus, as counsel described the testimony to the trial court, L.M. would not have testified regarding Y.R.'s demeanor the day *after* the assault, as he now claims. Further, defense counsel did not claim that L.M. would testify that appellant was *in* the swimming pool with Y.R., or that Y.R. played with her father. Counsel merely stated that L.M. would testify that Y.R. played in the pool, and that the testimony would show "who she played with and the demeanor with the father."[6]

It is appellant's burden to establish a clear abuse of discretion. (*Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359, 366.) Further, to establish an abuse of discretion, appellant must show that the exclusion of the testimony resulted in a miscarriage of justice. (*Ibid*.) Appellant does not contend that evidence of a happy demeanor *prior* to the assault would have rebutted Y.R.'s testimony regarding her feelings. He claims that evidence of a happy demeanor *after* the assault would have rebutted Y.R.'s testimony. It follows that appellant has not shown that the trial court acted arbitrarily or capriciously by rejecting testimony about Y.R.'s demeanor on Friday, *before* the assault was said to have taken place.

Appellant erroneously stated in his opening brief that Friday was July 13, and that Saturday was July 14. Appellant's confusion regarding the dates, both here and in his offer of proof at trial, suggests that L.M. would have described Saturday's events, not Friday's, particularly in light of both prosecution and defense testimony that L.M. was present Saturday. Y.R. testified that L.M. was present while she swam Saturday. Similarly, appellant's mother testified for the defense that L.M. visited Saturday, and that

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6 The trial court initially intended to allow the testimony, stating that it would "allow him to talk about how long they were in the pool, and if the father was in the pool and they were laughing." The prosecution objected, because Y.R. had not been asked how long she had been in the pool or whether appellant was in the pool with her.

L.M.'s children swam with Y.R. Saturday. Finally aware of the discrepancy, appellant claims in his reply brief that L.M. would have testified that Y.R. played happily in the pool on Saturday, July 15. However, appellant's contention does not establish an abuse of discretion, since we review the trial court's ruling under the offer of proof as it was made at trial. (See *People v. Lewis, supra,* 43 Cal.4th at p. 455.)

Further, appellant has shown no miscarriage of justice as a result of the exclusion of the facts to which he claims L.M. would have testified. (See *People v. Lamb, supra,* 136 Cal.App.4th at p. 581.) The exclusion of L.M.'s testimony did not deprive the defense of evidence that Y.R. had a happy demeanor on the day after the assault. Appellant's mother observed her playing, jumping, and having fun in the pool for approximately six hours Saturday. Moreover, Y.R.'s Saturday fun and happy demeanor did little, if anything, to rebut her testimony that she feared her father, and that he did not act like a dad, since, by his own admission, appellant was not there. Appellant testified that he was not at his mother's home Saturday -- that he had gone to Anaheim for the day.

Appellant contends that we must review the trial court's ruling under the harmless error standard expressed in *Chapman v. California* (1967) 386 U.S. 18. (See *Taylor v. Illinois* (1988) 484 U.S. 400, 414-415; *People v. Edwards* (1993) 17 Cal.App.4th 1248, 1266.) Since appellant has not shown an abuse of discretion, we conclude that the trial court did not err. Thus, we need not undertake a harmless error review. However, we observe that any such error would be harmless under any standard, because our review of the evidence reveals, beyond a reasonable doubt, that the absence of L.M.'s testimony did not contribute to the verdict. (*Chapman,* at p. 24.)

Appellant suggests that the trial was solely a credibility contest supported by weak DNA evidence found on panties, which, he argues, were shown to belong to M.S., not Y.R. Appellant dismisses the evidence of Y.R.'s DNA found on the panties, by arguing that because the DNA was consistent with Y.R.'s profile, it was also consistent with M.S.'s, who was still having sex with appellant. However, forensic scientist Edmonds

testified that the DNA on the panties was Y.R.'s, that it was not consistent with M.S.'s, and that if M.S.'s DNA had been on the panties, he would have seen foreign DNA markers, but did not. There was no evidence that the DNA on the panties could have been M.S.'s.

Further, the trial was not simply a credibility contest. The physical evidence was overwhelming. Y.R. suffered a recent injury consistent with sexual assault, semen was found in her vagina and on her panties, and the likelihood that the DNA extracted from the semen belonged to appellant was more than a trillion to one. Additional evidence that Y.R. had a day or two of fun in her grandmother's swimming pool would not have affected the verdict.

2. CALJIC No. 10.60

Appellant contends that the trial court erred in instructing the jury with CALJIC No. 10.60, as follows: "It is not essential to a finding of guilt on the charge of unlawful sexual intercourse or sexual activity, that the testimony of the witness with whom the sexual relations is alleged to have been committed be corroborated by other evidence." Because CALJIC No. 10.60 is an accurate statement of the law, it is not error to give it in a sex crime trial. (*People v. Gammage* (1992) 2 Cal.4th 693, 700-701.)

Appellant acknowledges that the California Supreme Court has approved the use of CALJIC No. 10.60, but contends that where the prosecution's case is a credibility contest, and the "complete essence" of the prosecution's case is the victim's testimony, the instruction creates the impression that the victim's testimony is entitled to special deference. Appellant's argument is apparently that the instruction, albeit a correct statement of law, could be misleading under the circumstances. We find no objection or proposed clarifying instruction in the record. Thus, appellant has not preserved that contention for review. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192.) Moreover, as this case was not merely a credibility contest, and the victim's testimony was, in fact, corroborated by Y.R.'s brother, her friend, K.B., and compelling physical evidence, no confusion was probable here.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

O'NEILL, J.*

We concur:

RUBIN, Acting P. J.

BIGELOW, J.

* Judge of the Ventura County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.